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FILED
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SUPREME COURT, U.S.

No. 98-584

In The

# Supreme Court of the United States

October Term, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Petitioner,*

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SOUTHERN PACIFIC TRANSPORTATION COMPANY'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Ninth Circuit correctly conclude that Congress abrogated the State of California's Eleventh Amendment immunity pursuant to Section Five of the Fourteenth Amendment when it enacted Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), now codified at 49 U.S.C. § 11501 (hereinafter "Section 306")?

## LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California.

Respondents are: Southern Pacific Transportation Company ("Southern Pacific"), a Delaware corporation with its principal place of business in Omaha, Nebraska; Northwestern Pacific Railroad Company and Visalia Electric Railroad Company which are related entities and wholly-owned subsidiaries of Southern Pacific. Following a merger with Union Pacific Railroad Company in 1997, Southern Pacific's name was changed to Union Pacific Railroad Company, a Delaware corporation with its principal place of business in Omaha, Nebraska. For ease of reference, these respondents shall be referred to collectively herein as "Southern Pacific."

Other Respondents are: The Napa Valley Wine Train, Inc., a California corporation with its principal place of business in Napa, California; The Stockton Terminal & Eastern Railway Company, a California corporation with its principal place of business in Stockton, California; The Santa Maria Valley Railroad Company, a California corporation with its principal place of business in Santa Maria, California; and the California Counties of Alameda, Amador, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lassen, Los Angeles, Madera, Marin, Mendocino, Merced, Modoc, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz,

**LIST OF PARTIES** – Continued

Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanilaus, Sutter, Tehama, Tulare, Ventura, Yolo and Yuba, all named as defendants below (hereinafter "defendant counties"). To date, none of the defendant counties has filed a brief in support of or in opposition to the Petition.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Southern Pacific respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") submitted by Petitioner State Board of Equalization of the State of California ("Petitioner").

## STATUTES INVOLVED

*See* Constitution of the United States, Constitution of the State of California, statutes or regulations set forth or noted on pages 2 through 4 of the Petition and reprinted at Appendix D thereto.

## STATEMENT OF THE CASE

This case concerns Petitioner's imposition of a tax which the district court has held, and which Petitioner does not dispute, is illegal and discriminatory in violation of Section 306. The district court had entered preliminary injunctions enjoining Petitioner and the defendant counties from attempting to collect any of the disputed tax for the 1993 through 1996 tax years, pending resolution of a related, consolidated case, *Atchison, Topeka & Santa Fe Railway Company v. State Board of Equalization of the State of California, et al.*, No. C 89-4030 DLJ, Master Consolidated No. C 81-4365 DLJ (N.D. Cal. filed Nov. 13, 1989) ("the *Santa Fe* case"). The *Santa Fe* case involved a tax identical to the one at issue here. There, the district court held a

trial and concluded that the discriminatory tax violated Section 306.

Based on the district court's decision in the *Santa Fe* case, Southern Pacific moved for summary judgment. Petitioner simultaneously filed a motion to dismiss, claiming it was immune from suit in federal court under the Eleventh Amendment.[1] In response to Southern Pacific's motion for summary judgment, Petitioner did not dispute that the tax violated Section 306. (*See* Petitioner's Response to Motions for Summary Judgment filed May 7, 1997). Instead, Petitioner simply reiterated its argument that it was immune from suit, incorporating by reference its motion to dismiss. *Id.* The district court agreed with Petitioner and dismissed Southern Pacific's claims on October 28, 1997.[2] Judgment was entered on February 3, 1998.

On February 27, 1998, Southern Pacific appealed to the Ninth Circuit. On March 23, 1998 the Ninth Circuit issued its opinion in *Oregon Short Line R.R. Co. v. Department of Revenue of Oregon*, 139 F.3d 1259 (9th Cir. 1998) ("*Oregon Short Line*"). In *Oregon Short Line*, the Ninth Circuit held that Congress validly abrogated Eleventh Amendment immunity pursuant to its powers under the

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[1] Petitioner had not raised that argument in the *Santa Fe* case prior to the trial.

[2] The district court simultaneously granted Santa Fe's motion for summary judgment. (*See* Appendix B to Petition). Petitioner appealed the district court's order in the *Santa Fe* case to the Ninth Circuit on June 15, 1998. *See* Ninth Circuit Docket No. 98-15128. On November 13, 1998, the Ninth Circuit granted Santa Fe's *unopposed* motion for summary affirmance of the district court's decision in that case.

Fourteenth Amendment when it enacted Section 306. *Id.* at 1267. On April 24, 1998, Southern Pacific filed a motion for summary disposition of its appeal based on the Ninth Circuit's decision in *Oregon Short Line*. On July 6, 1998, the Ninth Circuit granted Southern Pacific's motion, vacated the district court's decision, and remanded the case "for proceedings consistent with *Oregon Short Line*. . . . " (*See* Appendix A to Petition). Petitioner filed its Petition in this Court on October 5, 1998, appealing the Ninth Circuit's order.

Pursuant to the Ninth Circuit's mandate, on September 16, 1998, the district court entered judgment on mandate permanently enjoining Petitioner and the defendant counties from seeking to collect the discriminatory tax. (*See* Appendix B to Petition). On October 16, 1998, eleven days after filing its Petition here, Petitioner filed a notice of appeal to the Ninth Circuit, appealing from the judgment on mandate. (*See* Ninth Circuit Docket No. 98-15320, filed October 16, 1998). Thus, this matter – and indeed, according to Petitioner, the identical issue – is now pending before both this Court and the Ninth Circuit.[3]

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[3] Petitioner failed to seek: (1) a stay of the issuance of the Ninth Circuit's mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure; (2) a stay of the entry of judgment on the Ninth Circuit's mandate by the district court pursuant to Rule 62, Federal Rules of Civil Procedure; or (3) a stay from this Court pursuant to Rule 23, Supreme Court Rules.

## FACTUAL BACKGROUND

The proceedings below make clear two things: one, railroads are the only taxpayers upon whom Petitioner imposes the tax at issue; and two, Petitioner does not dispute that this tax discriminates against railroads in violation of Section 306. Instead, it simply maintains that it is immune from suit in federal court.

Southern Pacific's claims relate to Petitioner's taxation of certain property rights for tax years 1993 through 1996, which Petitioner labeled "non-unitary railroad property eligible for 4-R Act relief" ("NURPEFAR"). NURPEFAR is, in essence, a railroad's **unexercised** right to sell or do something different with its property in the future. The district court entered preliminary injunctions prohibiting the collection of these taxes and later, after a trial concerning the legality of the tax in the *Santa Fe* case, ruled that the tax violated Section 306. In finding that the NURPEFAR tax was discriminatory, the district court stated: "The evidence proves that no other similarly situated taxpayers have been taxed in the manner similar to . . . railroads. Neither other state assessees nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the unexercised 'right' to sell or do something different with their property in the future." (*See* Findings of Fact and Conclusions of Law ¶¶ 44-48, filed in the *Santa Fe* case on September 7, 1994).

## REASONS FOR DENYING THE PETITION

This Court should deny review for several reasons. First, the Petition is premature. This case is currently

pending before the Ninth Circuit where Petitioner has raised the identical issue it raised here. Second, there is no conflict among the circuit courts of appeals that have addressed the question presented here. Those courts have rejected Petitioner's arguments. Third, granting Petitioner the relief it seeks will not end this litigation as Southern Pacific should then be allowed to pursue its claims pursuant to *Ex parte Young*, 209 U.S. 123 (1908), against Petitioner's individual members. Similarly, it should be permitted to maintain its claims against the defendant counties which are parties to this action. Finally, the Petition should be denied because the Ninth Circuit correctly held that Congress validly abrogated Eleventh Amendment immunity pursuant to its powers under the Fourteenth Amendment.[4]

## I. REVIEW OF THE NON-FINAL ORDER OF THE NINTH CIRCUIT IS PREMATURE.

The primary reason that this Court should deny certiorari in this case is that the Petition is premature. Petitioner seeks review of a non-final order of the Ninth Circuit, which merely reversed the district court's dismissal of Southern Pacific's complaint and remanded the case to the district court for further proceedings. Because the case continues in the lower courts, review by this

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[4] Petitioner's request for relief meets none of the tests set forth in Supreme Court Rule 10, "Considerations Governing Review on Certiorari." Although the considerations in Rule 10 neither control nor fully measure the Court's discretion, they do "indicate the character of the reasons the Court considers" in granting review. *Lawrence v. Chater*, 516 U.S. 163 (1996).

Court of the constitutional question presented by the Petition may yet be rendered unnecessary.

Under these circumstances, it is the usual practice of this Court to deny certiorari. As this Court has frequently stated, certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted); *see also* Justice William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-32 (1983) ("[W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question."). Thus, the Court has stated that lack of finality "of itself alone furnishe[s] sufficient ground for denial of the application." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. Where, as here, a court of appeals has remanded a case for further proceedings, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967); *see also Urie v. Thompson*, 337 U.S. 163, 171-72 & n.10 (1949); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

In this case, further proceedings continue in the lower courts. Indeed, on remand, the district court reconsidered Southern Pacific's motion for summary judgment on direction from the Ninth Circuit. On the basis of the

summary judgment record, the court found that Southern Pacific was entitled to relief from discriminatory state tax practices under Section 306, entering final injunctive relief for the railroad. Petitioner filed a separate notice of appeal of that final judgment to the Ninth Circuit – after it filed its Petition in this Court – raising the exact same issues presented by the Petition: "Whether section 306 of [the] 4-R Act is appropriate legislation to enforce the Equal Protection Clause of the 14th Amendment so as to abrogate the State's Eleventh Amendment immunity from suit in federal court." (*See* Petitioner's Docketing Statement filed in the Ninth Circuit on October 16, 1998). Thus, the Ninth Circuit is currently considering the identical issue presented by the Petition here. Under these circumstances, prudence counsels that the proceedings below be allowed to continue, in order to shed additional light on the record and permit a more informed judgment in this Court, should it become necessary. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981) (where further proceedings may develop record and permit more informed judgment, compelling reasons exist for concluding that judgment is not final).

Because this Petition is not yet ripe for review in this Court, it should be denied. Petitioners are, of course, free to file a new petition should their pending Ninth Circuit appeal prove unsuccessful. *See Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (denial of petition at interlocutory stage of proceedings not treated as final disposition by this Court).

## II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE QUESTION PRESENTED.

The only two federal appellate courts which have addressed the precise issue now before the Court have held that Section 306 is a valid exercise of Congress' power to abrogate Eleventh Amendment immunity. Consequently, there is no conflict in the circuits sufficient to warrant review by this Court. *See* Sup. Ct. R. 10(a).

In *Oregon Short Line,* the Ninth Circuit squarely addressed the issue presented here. The court recognized that while states have broad authority to impose different tax burdens on different taxpayers, this Court "has not hesitated to strike down taxation schemes which do not rest 'upon some reasonable consideration of difference or policy . . . .' " *Oregon Short Line,* 139 F.3d at 1266, citing *Allegheny Pittsburgh Coal Co. v. County Comm'n,* 488 U.S. 336, 344 (1989). The Ninth Circuit found that Section 306 was designed to correct just that type of unreasonable taxation. The court discussed this Court's previous pronouncements concerning Section 306, as well as its legislative history, and concluded:

> In the face of all that, it would take an unusual amount of pertinacity to cling to the notion that Congress could not enact [Section 306] pursuant to its power under the Fourteenth Amendment. Surely the statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted its ends, and does not provide remedies which are disproportionate to the desired goal of eliminating discrimination. (Citing *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997)).

*Oregon Short Line*, 139 F.3d at 1267. The Ninth Circuit held that Section 306 "is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw its authority from Section Five of the Fourteenth Amendment." *Id.*

Similarly, only eight days after the Ninth Circuit rendered its decision in *Oregon Short Line*, the United States Court of Appeals for the Third Circuit independently reached the same conclusion in *Wheeling & Lake Erie Railway Company v. Public Utility Commission of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998).[5] Faced with the identical issue, the Third Circuit noted that the legislative history of Section 306 shows that Congress was aware of states' discriminatory taxation practices against railroads. *Id.* at 93. The court stated that "the very purpose of section [306] was to remedy discrimination against railroads," *id.*, and concluded:

> It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection rights under the Fourteenth Amendment. We conclude that Congress had the power, pursuant to Section Five of the Fourteenth Amendment, to promulgate section [306], and did so to protect the railroads. Therefore, Congress validly abrogated Eleventh Amendment immunity, and the district court properly exercised jurisdiction over this lawsuit.

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[5] Curiously, although Petitioner was aware of *Wheeling* because Southern Pacific cited it to the Ninth Circuit as additional support for its motion for summary disposition, Petitioner fails to even mention *Wheeling* in its Petition.

*Id.* The Third Circuit also discussed this Court's recent decision in *City of Boerne*, concluding that Section 306 "is not out of proportion to its objective, nor does it change any constitutional protections." *Id.*

In summary, *Oregon Short Line* and *Wheeling* are consistent with each other and with this Court's prior decisions concerning Congress' authority to abrogate Eleventh Amendment immunity under Section Five of the Fourteenth Amendment. Accordingly, there is no reason for this Court to grant review.

## III. ALTERNATIVE GROUNDS FOR THE RELIEF GRANTED EXIST IN THIS CASE.

A conclusion that Congress could not abrogate Eleventh Amendment immunity in enacting Section 306 would not end the inquiry regarding the permissibility of the requested injunctive relief in this case. The complaint here was filed not only against the state but also against the counties responsible for collecting the discriminatory tax.[6] Even assuming no congressional abrogation, only the state itself is protected by the Eleventh Amendment

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[6] As noted by Petitioner, Southern Pacific timely moved to amend its complaint to add as defendants the individual members of Petitioner who are responsible for administering the law in order to assert a claim under *Ex parte Young*. The district court denied the motion when it granted Petitioner's motion to dismiss, a ruling which Southern Pacific challenged in its appeal to the Ninth Circuit. (Appendix B to Petition). Thus, this issue remains to be resolved in this case.

from suits for injunctive relief. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

This Court has recently reiterated that the Eleventh Amendment does not foreclose an action for injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against a state official "to prevent . . . continuing violation[s] of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. at 155-56). In *CSX Transportation, Inc. v. The Board of Public Works of the State of West Virginia*, 138 F.3d 537 (4th Cir. 1998), the Fourth Circuit held that under the doctrine of *Ex parte Young*, injunctive relief is available in federal court against the individual public officials involved to enjoin the collection of taxes which are discriminatory in violation of Section 306, even taxes that have already been assessed but not yet collected.[7] *CSX*, 138 F.3d at 543. This Court recently denied West Virginia's petition for a writ of certiorari in *CSX*. *West Virginia Board of Public Works v. CSX Transportation, Inc.*, 142 L. Ed. 2d 50 (1998).

Here, as in *CSX* , the railroad has not paid any of the disputed taxes. Thus, even if the Eleventh Amendment did provide Petitioner a defense, Southern Pacific would still be allowed to maintain its claim for injunctive relief against individual state officials acting in their official capacities.

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[7] Because of its ruling on the *Ex parte Young* issue, the Fourth Circuit did not reach the issue of whether Congress validly abrogated the state's Eleventh Amendment immunity under the Fourteenth Amendment in *CSX*. *Id.* at 540, n.4.

Granting Petitioner the relief it seeks would not dispose of this case for the additional reason that Southern Pacific's claims against the counties, which are parties to this action, are still pending. The Eleventh Amendment does not protect the counties from a suit for injunctive relief. *See, e.g., Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *M.T. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667, n.12 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 718-20 (1973). Section 306 expressly contemplates that a railroad may bring an action against counties, as has been done by Southern Pacific here. Congress stated: "The following acts unreasonably burden and discriminate against interstate commerce, and a state, **subdivision of a state**, or authority acting for a state or a subdivision of a state may not do any of them. . . . [A] district court of the United States has jurisdiction . . . to prevent [such acts]." 49 U.S.C. § 11501(b), (c) (emphasis added). Here, complete relief could be afforded to Southern Pacific without Petitioner or its individual members as parties to this action. Ultimately, what matters to Southern Pacific is that the defendant counties in this action do not attempt to collect discriminatory taxes imposed in violation of Section 306. For this reason, injunctions have been entered enjoining the defendant counties **"from collecting or seeking to collect any taxes"** on the property at issue. (*See, e.g.*, Order for Preliminary Injunction as to 1996 Taxes of Southern Pacific Transportation Company entered December 4, 1996). The defendant counties, not Petitioner, collect the taxes at issue. Hence, even if Petitioner were ultimately dismissed from this action, Southern

Pacific could obtain complete relief from the defendant counties.[8]

## IV. THE NINTH CIRCUIT'S CONCLUSION THAT CONGRESS VALIDLY ABROGATED ELEVENTH AMENDMENT IMMUNITY PURSUANT TO ITS POWERS UNDER THE FOURTEENTH AMENDMENT IS CORRECT.

In determining whether Congress has properly abrogated a state's sovereign immunity from suit through federal legislation, a court must ask two basic questions: (1) whether Congress has unequivocally expressed its intent to abrogate the states' immunity; and (2) whether Congress has acted pursuant to a valid exercise of power. *Seminole Tribe*, 517 U.S. at 54.

In this case, it is undisputed that Congress intended to abrogate the states' Eleventh Amendment immunity in enacting Section 306. Congress clearly expressed its intent to permit federal courts to exercise jurisdiction over suits against the states: "a district court of the United States has jurisdiction . . . to prevent a violation" of Section 306. 49 U.S.C. § 11501(c). Thus, the focus of this dispute is on the second question; *i.e.*, whether Section 306 was enacted pursuant to a valid exercise of congressional power.

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[8] The district court disagreed with Southern Pacific concerning this issue, as it held that Petitioner was an "indispensable party" under Rule 19, Federal Rules of Civil Procedure. Again, due to the summary disposition of Southern Pacific's appeal based on the *Oregon Short Line* decision, this issue was never reached by the Ninth Circuit and remains to be resolved.

The Ninth Circuit was clearly correct in concluding that Congress had the power to enact Section 306 pursuant to the express constitutional grant of legislative power found in the Fourteenth Amendment enforcement clause.[9] *Seminole Tribe* expressly reaffirmed this Court's long-standing rule that Congress has the authority to abrogate immunity pursuant to its remedial Fourteenth Amendment power to enforce by "appropriate legislation" the substantive protections of the Equal Protection Clause. *Seminole Tribe*, 517 U.S. at 58 (reaffirming *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Here, Congress clearly had the authority under the Fourteenth Amendment to enact legislation to prohibit pervasive and invidious discrimination against interstate railroads.

Section 306 was "Congress' solution to the problem of discriminatory state taxation of railroads. . . . " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). It was enacted to address the concern that railroads " 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994) (quoting *Western Air Lines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987) and S. Rep. No. 91-630, p. 3 (1969)).

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[9] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, Section Five.

Section 306 of the 4-R Act represents a congressional determination that state tax discrimination against railroads is "neither fair, equitable, nor justifiable." *Discriminatory State Taxation of Interstate Carriers*, S. Rep. No. 630, 91st Cong., 1st Sess. 2 (1969) (citation omitted). In order to combat that discrimination, Congress prohibited certain discriminatory state tax assessment and collection practices in Section 306. At the same time, Congress provided that "a district court of the United States has jurisdiction" to prohibit continuing discriminatory taxation by the states, as provided by the statute. *See* 49 U.S.C. § 11501(c). It deemed the federal remedy necessary in order to provide the railroads with a "plain, speedy and effective remedy" necessary "to eliminate discriminatory tax assessment and classification practices" by the states.[10] S. Rep. No. 630 at 8, 91st Cong., 1st. Sess. (1969).

Petitioner's suggestion that Congress could not have acted under its Fourteenth Amendment powers in enacting Section 306, because it did not expressly so state is without merit. The fact that Congress may not have

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[10] As this Court noted, more than a century ago:

> Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may enforce the right, that is, enforce its recognition **by removing the case from a State court in which it is denied, into a Federal court, where it will be acknowledged.**

*Virginia v. Rives*, 100 U.S. 313, 318 (1879) (emphasis added). This is exactly what Congress did in enacting Section 306.

recited its Fourteenth Amendment enforcement power in enacting Section 306 is not determinative. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."). In evaluating whether a congressional enactment is a valid exercise of congressional authority under its Fourteenth Amendment enforcement power, the proper inquiry is not whether Congress properly recited the authority under which it acted, but rather whether Congress ***could have*** so acted. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("That does not mean . . . that Congress need anywhere recite the words 'Section Five' or 'Fourteenth Amendment' or 'equal protection' " in order to invoke its authority).[11]

Moreover, Petitioner fails to cite to the Court the legislative history and case law which are replete with evidence that Congress, in enacting Section 306, intended to put an end to the invidious discrimination states engaged in when taxing railroads.

Section Five of the Fourteenth Amendment dictates deference to the congressional determination found in Section 306 that a federal judicial remedy is necessary to eliminate discrimination against railroads. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989), this Court noted that Congress' Fourteenth Amendment power to prohibit discriminatory state conduct includes the power

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[11] *See also Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) ("It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment" that the Fourteenth Amendment was violated).

to "define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court equated Congress' Section Five powers with broad powers expressed in the Necessary and Proper Clause:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*Morgan*, 384 U.S. at 650 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880)); *see also Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980) (opinion of Burger, C.J.).

Relying upon *Ex parte Virginia*, the *Morgan* Court set out a three-part test for determining when an enactment is appropriate legislation to enforce the Equal Protection Clause. Legislation is "appropriate" under the Fourteenth Amendment enforcement power if: (1) the statute may be regarded as an enactment to enforce the Equal Protection Clause; (2) it is plainly adapted to that end; and (3) it is not prohibited by but is consistent with the letter and spirit of the Constitution. *Morgan*, 384 U.S. at 651.

Courts accord "great weight to the decisions of Congress" in reviewing congressional enactments addressing equal protection concerns. *Fullilove*, 448 U.S. at 472 (citation omitted); *see Morgan*, 384 U.S. at 653 ("It was for Congress . . . to assess and weigh the various conflicting

considerations. . . . It is not for us to review the congressional resolution of these factors."). Accordingly, "Congress must have wide latitude in determining" proper measures "that remedy or prevent unconstitutional actions." *City of Boerne*, 117 S. Ct. at 2164.

Because it was enacted to prohibit a form of invidious state discrimination that Congress found particularly damaging to interstate railroads, Section 306 properly should be regarded as legislation to enforce the guarantee of equal protection of the laws. The threshold for such a determination is permissive, favoring a finding of congressional authority: "It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under Section Five of the Fourteenth Amendment that we be able to discern ***some legislative purpose or factual predicate*** that supports the exercise of that power." *EEOC v. Wyoming*, 460 U.S. at 243 n.18 (emphasis added).

Obviously, Congress' power under Section Five is not unbounded. Congress may not, under the guise of its enforcement power, "decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 117 S. Ct. at 2165. Thus, legislation "which alters the meaning" of the amendment's substantive provisions "cannot be said to be enforcing the clause." *Id.* For that reason, legislation that cannot conceivably be defended on the basis of preventing discrimination is invalid under Section Five. *See Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996), *modified*, 107 F.3d 358 (6th Cir. 1997) (FLSA

minimum wage and overtime provisions cannot reasonably be viewed as enactments to enforce the Equal Protection Clause); *Mills v. Maine*, 118 F.3d 37, 49 (1st Cir. 1997) (same).

Where legislation seeks merely to "remedy or prevent" unconstitutional discrimination, however, it is a valid exercise of congressional authority under Section Five. *See City of Boerne*, 117 S. Ct. at 2157. Thus, congressional legislation aimed at preventing invidious state discrimination against a discrete group, such as the railroads, is clearly justified under Section Five. *See United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) ("Congress's power under Section Five of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law. . . . "), *cert. denied*, 451 U.S. 1002 (1981); *see also Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that [the state law in question] . . . constituted an invidious discrimination in violation of the Equal Protection Clause.").

Moreover, as the Court recently noted in *City of Boerne*, 117 S. Ct. at 2163, Congress' authority to legislate under Section Five ***extends to the prohibition of state action which is otherwise permissible under the Equal Protection Clause***:

> Legislation which defers or remedies constitutional violations can fall within the sweep of Congress' enforcement power ***even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative***

***spheres of autonomy previously reserved to the states."***

*City of Boerne*, 117 S. Ct. at 2163 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)) (emphasis added). *See also Morgan*, 384 U.S. at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.").[12] Thus, the fact that certain of the

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[12] While *City of Boerne* discusses the relevant standards to be applied in determining whether legislation is "appropriate" under the Fourteenth Amendment enforcement clause, the particular holding of the case is inapposite to this dispute. In *City of Boerne*, the Court concluded that Congress lacked the power to alter the substance of the Fourteenth Amendment by statute. *See City of Boerne*, 117 S. Ct. at 2165. There, the Court considered Congress' power to enact the Religious Freedom Restoration Act of 1993 ("RFRA"). In enacting RFRA, Congress intended to overrule by statute, the Supreme Court's recent interpretation of the First Amendment Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), which had held that the government need not "justify burdens on religious exercise imposed by laws neutral toward religion," and instead required a compelling governmental interest to justify such legislation. *City of Boerne*, 117 S. Ct. at 2162 (quoting 42 U.S.C. § 2000bb(a)).

Because the statute attempted to rewrite substantially the contours of the First Amendment, the Court found that it could not be justified as "appropriate legislation" to enforce the free speech guarantees incorporated into the Fourteenth Amendment. *Id.* at 2168-72. The Court concluded that the enforcement power could not be asserted as a justification for such "general legislation upon the rights of a citizen." *Id.* at 2166

state activities barred by Section 306 might pass muster under the Equal Protection Clause does not prevent the Congress from prohibiting them under its Fourteenth Amendment enforcement power.[13]

While the line between substantive legislation prohibited by Section Five and remedial legislation permitted by it sometimes is "not easy to discern," *City of Boerne*, 117 S. Ct. at 2164, this Court has repeatedly reaffirmed the principle that remedial legislation may sweep broader than the substantive constraints of the Equal Protection Clause. *See, e.g., Morgan*, 384 U.S. at 643, 649 (provision of the Voting Rights Act of 1965 that prohibited states from denying individuals the right to vote based on their inability to speak English was "appropriate legislation" to enforce the Equal Protection Clause

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(quoting *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883)). Consequently, the Court concluded that "Congress could [not] define its own powers by altering the Fourteenth Amendment's meaning. . . . " *Id.* at 2168. This is plainly not the case here.

[13] Petitioner suggests that prior to the passage of Section 306, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause, citing *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940). (Petition at 9-10). *Browning* has no application here. This case does not involve a state "classification" for property tax purposes. Instead, as the district court found, California's imposition of the NURPEFAR tax was discriminatory under Section 306(1)(d), because it was a tax imposed **solely** on railroads. As the Ninth Circuit noted in *Oregon Short Line*, notwithstanding *Browning*, this Court "has not hesitated to strike down taxation schemes which do not rest 'upon some reasonable consideration of difference or policy. . . . ' " *Oregon Short Line*, 139 F.3d at 1266 (citations omitted).

despite the Court's previous ruling that an English literacy requirement was "not in all circumstances prohibited" by the Fourteenth and Fifteenth Amendments). The governing test for determining when such legislation can be considered proper remedial legislation under Section Five is that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. "The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169.

Under this standard, Section 306 must be viewed as an appropriate remedial measure to enforce the Equal Protection Clause. As explained below, the injury to be prevented by the legislation – discriminatory taxation against railroads by the states – was substantial. Congress' desire to remedy this injury was properly grounded in two traditional equal protection concerns: (1) protecting railroads as a discrete class from being singled out for disparate treatment by the states, and (2) prohibiting discrimination against the instruments of interstate commerce generally. Finally, the remedial measures enacted in Section 306 were narrowly tailored to address only those equal protection concerns.

Before the enactment of Section 306, discriminatory state taxation practices were having a crippling effect on the railroad industry. *See* S. Rep. No. 630 at 3. Indeed, in a nine-year period ending in the late 1960s, "the railroads alone ha[d] been assessed more than $900 million in discriminatory taxes." *Id.* Moreover, as Congress made clear in the legislative history to Section 306, railroads generally had insufficient representation in state political

processes to protect themselves from this arbitrary and discriminatory state taxation:

> Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals.
>
> While all interstate common and contract carriers are subject to discriminatory tax practices . . . there is no doubt that the railroad industry suffers most from the burdens which this bill would remove.

*Id.* Consequently, Congress sought to address what it perceived as a substantial and invidious form of discrimination against the railroad industry.

The statutory language and legislative history of Section 306 make clear that the basic purpose of the legislation was to prohibit this discriminatory treatment of the railroads by the states. The 4-R Act plainly recites that one of its many purposes is "to prohibit unlawful discrimination." 49 U.S.C. § 10101(12). Moreover, long before it was incorporated as a provision of the 4-R Act, Section 306 was endorsed by the Senate Commerce Committee in reports entitled, "Discriminatory State Taxation of Interstate Carriers." *See* S. Rep. No. 1483; S. Rep. No. 630. Those reports described the background of discriminatory practices against which Section 306 was enacted, noting that in the decade leading up to the enactment of the statute, states had assessed nearly $1 billion in discriminatory taxes against the railroads. S. Rep. No. 630 at 3. Thus, the record before Congress contained numerous

"examples of modern instances" (*City of Boerne*, 117 S. Ct. at 2169), of state tax discrimination against railroads. As previously noted, Congress was sympathetic to the dilemma the railroads faced as a result of lack of representation in each state's political process.

The Committee recognized that the Fourteenth Amendment Equal Protection Clause placed some limitations on the states' authority to single out railroads in taxation. S. Rep. No. 630 at 7. The Committee summarized testimony of the Chairman of the Interstate Commerce Commission regarding cases in which courts had found state tax practices to violate the Equal Protection Clause:

> [I]n the last few years . . . Federal district courts, **acting under the "equal protection" clause of the 14th Amendment of the Constitution**, have voided discriminatory tax assessments and levies on common carrier property to the extent such practices were in conflict with the applicable State laws or constitutional provisions.

*Id.* (emphasis added and citations omitted). Consequently, Congress was aware of the limitations that the Equal Protection Clause placed on states in taxing railroads and it enacted Section 306 against that background. Congress recognized that, under the Fourteenth Amendment, states cannot single out a group of taxpayers for unequal application of state tax laws that are facially neutral. *See also Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989).

Congress further recognized the importance of this rule in the railroad context, where this Court has not hesitated to strike down discriminatory state taxing

schemes involving railroads. *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) (intentional and arbitrary assessment of one owner for taxation at its true value, in accordance with the state constitution and laws, while other like property is systematically assessed much lower, is a violation of the equal protection of the laws); *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910) (discriminatory taxation of railroad violated the Equal Protection Clause); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (discriminatory method of reassessment applied to street railroad company's property found to be a violation of the Equal Protection Clause of the Fourteenth Amendment). *See also Louisville & Nashville R.R. Co. v. Public Service Commission*, 249 F. Supp. 894 (N.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968) (assessments of railroad properties at a higher percentage of actual cash value than the custom in assessing other property at a smaller fraction of actual cash value found as discriminatory assessment against railroads violative of the Equal Protection Clause of the Fourteenth Amendment). Hence, to the extent that Section 306 prohibits such practices, it is indisputably within congressional authority under Section Five of the Fourteenth Amendment.[14]

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[14] Moreover, this Court has repeatedly noted that the limitations on state taxation practices with respect to interstate companies are defined, in part, by the Equal Protection Clause. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655-56 (1981) (noting that challenges to discriminatory state taxation are governed by three clauses of the Constitution: the Commerce Clause, the Privileges and Immunities Clause of Art. IV. § 2, and the Equal Protection Clause of the Fourteenth Amendment).

Section 306 thus represents a reasonable exercise of Congress' power to prevent and remedy invidious discrimination against railroads, a discrete class of taxpayers that had been singled out for disproportionate taxation.

The means adopted by Congress to remedy this discrimination were clearly proportional to the end sought to be achieved. Congress enacted Section 306 to ameliorate the effects of discriminatory taxation by the states. The means adopted to end this discrimination – Section 306's prohibition against discriminatory state taxation practices and its federal court remedy – are narrowly drawn "to reach the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious action by the state." *EEOC v. County of Calumet*, 686 F.2d 1249, 1252 (7th Cir. 1982). The statute's limited purpose is "[t]o provide a plain, speedy, and effective remedy to eliminate discriminatory tax assessment and classification practices. . . . " S. Rep. No. 630 at 8.

In enacting the remedial provisions of Section 306, Congress placed several major limitations on the railroad's ability to sue for relief. First, relief under the statute is limited to that necessary "to ***prevent*** a violation of" its anti-discrimination provisions. 49 U.S.C. § 11501(c) (emphasis added). Thus, railroads generally have recourse only to non-monetary, equitable and declaratory relief. *See* Pub. L. No. 94-210, § 306(2). And even when granting non-monetary relief, courts may only enjoin the assessment, levy or collection of the ***discriminatory portion*** of the state tax. Railroads may not obtain relief from that portion of the state tax which does not run afoul of Section 306's prohibitions. Thus, the statute does not

unduly interfere with the normal practices of a state taxing authority or with the states' ability to govern on a day-to-day basis.

Moreover, Congress did not sweep every single instance of discrimination by the states within the prohibition of the statute. Instead, Congress sought only to prevent certain discriminatory practices that had a ***substantial*** impact on the railroads. In addressing discrimination by the states in their property valuation practices, Congress provided that relief may be granted "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(c). This five-percent threshold leaves the states unfettered to engage in practices that might otherwise violate the Equal Protection Clause where the impact of the practice is negligible. *See Burlington Northern*, 481 U.S. at 464 ("Such a provision makes sense as a prohibition on the litigation of *de minimus* disparate-impact claims in the federal courts. . . . ").

Finally, in enacting Section 306, Congress gave the states three years in which to comply with its anti-discrimination provisions. Pub. L. No. 94-210, § 306(2)(b) ("provisions of this section shall not become effective until 3 years after the date of enactment of this section"). This delayed effective date provision allowed states sufficient time to review and amend their taxing statutes and practices in order to guarantee compliance. The lack of a similar provision in RFRA was one of several reasons this Court struck down the RFRA provisions at issue in *City of Boerne*, 117 S. Ct. at 2170 ("RFRA applies to all federal

and state law, statutory or otherwise, whether adopted before or after its enactment.").

Consequently, the limited remedy effected by Section 306 strikes the very balance required of legislation to enforce the substantive provisions of the Equal Protection Clause. While it addresses a substantial form of discrimination within the power of Congress to remedy, Section 306 is narrowly tailored to preventing that discrimination. Under the *City of Boerne* standard, then, Section 306 is clearly an appropriate measure to "enforce" the Fourteenth Amendment.[15]

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[15] The remaining *Morgan* tests are easily satisfied. First, it is clear that the means chosen by Congress to remedy the discrimination is plainly adapted to remedying the discrimination. The limited judicial remedy authorized under Section 306 is no broader than necessary to prevent ongoing discrimination. Second, if deemed permissible under the Fourteenth Amendment, Section 306 is not prohibited by any other substantive provision of the Constitution. *See Morgan*, 384 U.S. at 651.

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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